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July 9, 1984

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Attorneys at Law
P. O. Box 10
Flagstaff, Arizona 86002

Dale K. Patton, Jr., Esq.
Navajo County Attorney
Navajo County Governmental Center
Holbrook, Arizona 86025

Re: I84-097 (R84-065)
(R84-071)

Gentlemen:

We have reviewed the opinion of Mr. Pickett to the Superintendent of the Page Unified School District concerning its retirement program for certificated and classified employees and the opinion of Mr. Patton to the Superintendent of the Winslow Unified School District pertaining to the same subject. Because many of the issues addressed in each of these opinions are identical, we have consolidated our revision of these opinions.

The Page District proposes to offer its certificated and classified employees a retirement program wherein an employee may elect to retire before mandatory retirement in return for an "incremental increase in salary" during the final fiscal year of employment and payment of health insurance benefits until the employee reaches age 70. Following retirement the employee is required to work without further compensation as a consultant to the District for up to ten days each year until the employee reaches age 70.

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Similarly, the Winslow District contemplates an early retirement program whereby its retired certificated employees would be employed part-time following retirement. Mr. Patton's opinion also addresses the propriety of an early retirement program for non-certificated employees, the provision of health and life insurance until the retired employee is eligible for Medicare benefits or until age 65, and a proposal for compensating an employee who retires after at least ten years of service for unused sick leave.

A school district may enter into contracts providing for payments to employees who were tenured teachers or administrators in exchange for the voluntary release by the employees of tenure rights or employee benefit rights incurred during their employment. Ariz. Atty. Gen. Ops 184-026; 184-043. A district is authorized to provide medical and other employment benefits to its employees as part of their compensation. Ariz. Atty. Gen. Op. 180-138. See also Ch. 194, Ariz. Sess. Laws 1984 (2nd Reg. Sess.) which amended A.R.S. § 15-302 to specifically authorize the school district's governing board to provide various fringe benefits. We consider the "incremental increase in salary" contemplated by the Page District and the provision of employee benefits as contemplated by both districts to be authorized payments and to be a form of termination pay.¹ A determination of the adequacy of consideration can only be made after reviewing each district's plan to determine what employment rights an employee would be forfeiting by taking early retirement.

One basic problem with these proposals is the duration of the proposed contracts. Both programs contemplate that the district and the retiring employee enter into a contract which may be for more than one year in duration. Contracts with superintendents and principals may be for any period not exceeding three years. A.R.S. § 15-503. Contracts with all other employees must be limited to no longer than one year

1. Such payments, however, do not constitute compensation within the meaning of A.R.S. § 38-781.01(5) which defines "compensation" for purposes of the State Retirement Plan. Calling such payments "salary" may, therefore, be misleading respecting the State Retirement Plan.

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as authorized by A.R.S. § 15-502.A. See Ariz. Atty. Gen. Op. 179-053.² To the extent that these programs would require a contract which would extend in excess of the statutory periods, they are invalid because school boards have only the authority granted by statute. School District No. 69 of Maricopa County v. Altherr, 10 Ariz. App. 333, 338, 458 P.2d 537(1969).

Moreover, a contract providing for continued employment for several years following the last year of regular employment is invalid because a school district board lacks authority to obligate the district and its future boards to make expenditures in years subsequent to the year in which services are to be rendered. A.R.S. § 15-906. See Ariz. Atty. Gen. Ops. 179-025 and 181-119. The retirement benefits available to a district employee are limited to those specified in A.R.S. Title 38, Ch. 5, Arts. 2 and 2.1; a district is not authorized to provide any other retirement benefits. Ariz. Atty. Gen. Op. 171-16. A payment to induce early retirement is not a retirement benefit and, in order to satisfy A.R.S. § 15-906, it must be paid from funds available for expenditure for that purpose by the district in the fiscal year of the employee's last employment.

We concur with Mr. Pickett's statement that the rules and regulations of the district may form part of the employee's contract. See Haverland v. Tempe Elementary School District No. 3, 122 Ariz. 487, 595 P.2d 1032 (App. 1979); Board of Trustees of Maricopa Elementary School District No. 6 v. Wildermuth, 16 Ariz. App. 171, 492 P.2d 420 (1972). A duly adopted rule or regulation, although subject to change by the board, promotes a greater uniformity of application and year-to-year stability than the individual contracts, and, therefore, it is the best means of providing for fringe benefits, including retirement incentives and benefits, applicable to each of the several classes of its

2. A.R.S. § 15-538.01 allows the governing board to offer a continuing teacher a contract for two years. However, that provision is not applicable since these teachers at issue are not continuing teachers.

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employees.^{3/} When such a system is utilized, the board still retains the authority and responsibility to fix the employee's salary when signing the contract for the following year by incorporating those regulations in the contract the board deems appropriate in light of the employee benefits already vested and the financial condition and needs of the school district. See Taft v. Bean, 24 Ariz.App. 364, 538 P.2d 1165 (1975).

We are unable to assess the validity of the early retirement program for non-certified employees of the Winslow District. The consideration to the district for its payment to induce early retirement is the forfeiture of some kind of employee rights belonging to the retiring employee. We have no information concerning such rights of the district's employees other than its continuing and probationary teachers. We note, however, that several of the problems discussed above concerning the program for certified employees are also present in the Winslow District proposal for non-certified employees.

We continue to be concerned about the validity of an early retirement incentives policy which incorporates age-based criteria. See Ariz.Atty.Gen.Op. 184-067. All age-based criteria under age 70 should be eliminated from any early retirement incentives policy unless it can be clearly established that such a policy is a bona fide employee benefit plan which is not a subterfuge to evade the purposes or prohibitions of the Age Discrimination Act. 29 U.S.C. § 623(f). We do not have sufficient information to enable us to conclude whether the unused sick leave proposal of the Winslow District qualifies as a bona fide employee benefit

3. The use of a rule to establish employee benefits was approved in Wildermuth and in Godbey v. Roosevelt School District No. 66 of Maricopa County, 131 Ariz. 13, 638 P.2d 235 (App. 1981)

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plan. We recommend that all age-based criteria either be eliminated from the district's employee benefits program or that such criteria be closely meshed with the State Retirement Plan.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Bob Corbin".

BOB CORBIN
Attorney General

BC:SMS:jb

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April 10, 1984

Mr. Russell W. Harrach
Superintendent
PAGE UNIFIED SCHOOL DISTRICT
P. O. Box 1927
Page, Arizona 86040

R84- 071

RE: Request for Opinion Concerning Page
Unified School District Retirement
Program

Dear Mr. Harrach:

This law firm serves as legal counsel to the Page Unified School District No. 8 of Coconino County. In such capacity, you have requested our opinion in answer to the following question:

Whether your district may offer to both classified and certificated employees a retirement program wherein an employee may elect to retire before mandatory retirement age in return for an incremental increase in salary during the final fiscal year of employment and payment of health insurance benefits until reaching age 70. Under the program, the employee is compelled to notify the superintendent, and through him the Governing Board no later than February 1, prior to the employee's last year of active employment, of the employee's desire for early retirement, which the Board may approve or deny. Following retirement, the employee is required to provide up to ten working days of consulting services to the school district without further compensation, each year until reaching age 70.

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The program under consideration consists of an adopted policy of the School Board. It is noteworthy that policies, rules and regulations adopted by a school district governing board may form part of the contract of employment between the school district and employees. See, Haverland v. Tempe No. Three, 122 Ariz. 487, 595 P.2d 1032 (App. 1979).

The provision of various forms of employee benefits has been the subject of study in numerous opinions of the Arizona Attorney General. For example, it has been noted that disability insurance, housing allowances, medical insurance, life insurance, tuition allowances, and the like are fringe benefits which may be provided by a school district. See, Op. Atty. Gen. No. 180-138.

In the specific area of retirement programs, the Attorney General has taken the position that a prerequisite to any payments to or for the benefit of a teacher (which would include payment of health benefit premiums during retirement) is that a specific contractual agreement exist with employees. In recent opinions, this theme is found in Op. Atty. Gen. 183-051, which holds "that a district, as part of its current employee negotiations, may agree to pay health insurance premiums for employees as they retire." The authority continues in Op. Atty. Gen. 183-096, which holds that "absent a contractual provision providing for the payment, school districts have no express or implied statutory authority to pay a teacher in exchange for the teacher's resignation," and such a payment would therefore be unlawful. Most recently, in Op. Atty. Gen. 184-026, the Attorney General has held that "a district may, by contract, agree to pay a teacher in return for a teacher's resignation. However, resignation is voluntary."

With this background of interpretations of Arizona law, it is appropriate to analyze the system under consideration in your district. Certificated employees must notify the superintendent and the Governing Board at a time prior to the issuance of teaching contracts, and the Governing Board must also act before that time, to either (1) reject the application for early retirement or (2) contract with the employee for the ensuing fiscal year. If the latter option is selected, the contract provides that employment shall be at the enhanced rate for the final year, health insurance benefits shall be furnished thereafter pursuant to contract, and the teacher's voluntary resignation shall be effective at the conclusion of the next

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ensuing fiscal year of employment. Similarly, classified employees whose employment is on a fiscal year basis must also contract with the Board for comparable terms of employment during the final year of employment, and thereafter. Keeping in mind that the policies of the Governing Board are deemed by law in Arizona to form a part of the contract of employment between the Governing Board and its employees (see, Haverland, supra), it appears that the system under consideration in your district constitutes a part of the contractual relationship existing between the Governing Board and employees there, and that when implemented in a specific case, forms a part of a contractual agreement to pay a teacher in return for a teacher's resignation, as approved in Op.Atty.Gen. 184-026, and, based upon current negotiations with individual employees, constitutes an agreement to pay health insurance premiums for employees as they retire in the future as specifically approved in Op.Atty.Gen. 183-051.

The only concern which would remain would be whether the Governing Board was, in an individual case, making a gift of public monies in violation of the Arizona Constitution, Article 9, Section 7. While analysis of this question might more properly be taken up on a case-by-case basis, it is appropriate to point out that school district governing boards must act for the public interest. School District No. 69 of Maricopa vs. Altherr, 10 Ariz.App. 333, 458 P.2d 537 (1969). In determining the appropriateness of expenditures, however, a great deal of deference is paid to the discretion of the Governing Board in determining whether expenditures are made for a public purpose. Cf., Board of Regents of University and State Colleges vs. Frohmiller, 69 Ariz. 50, P.2d 833 (1949).

Noting that the early retirement benefits under consideration are not automatically granted to each applicant, but are granted only if the Governing Board, on an individual basis, determines that such retirement is in the best interest of the district, it remains the task of the Governing Board in each case to make such a determination. In the case of your specific program, the Governing Board would in each case obtain, in return for a salary increase during the last year of employment and continued payment of health benefits until age 70, a commitment to ten days of consulting services annually until the retired employee attains age 70. In addition, in an individual case the Governing Board might obtain a significant financial benefit if the retiring employee was paid a high salary as a result

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of extended education, length of service with the district or other factors, in that relatively high salary payments would be eliminated from the district's maintenance and operation budget during the years in which the employee would otherwise continue in full time service to the district, while perhaps a new employee might commence employment at a substantially lower salary level.

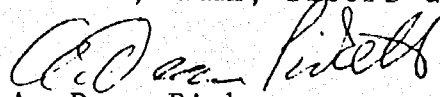
It is thus our opinion, under the specific circumstances of this retirement program, that if the Governing Board in an individual case deems the provision of such retirement benefits to be in the public interest of the school district, and following such finding, specifically contracts with an employee to obtain the employee's resignation effective at the end of the contracted for final year of employment, and at a time prior to attaining mandatory retirement age, such a program is permissible under Arizona law.

We caution that this opinion extends only to the specifics of the retirement program under consideration in your district. Other systems of retirement which have been considered in other districts have apparently not contained certain key elements which would differentiate them from your district's program, including, in your case, (1) the requirement that the applicant apply, and the Board approve, early retirement prior to the final year of employment, thus making the resignation and extension of benefits contractual in nature, (2) the fact that specific services by the retiree are still to be provided during the years in which health benefits are provided, and (3) the fact that the Governing Board is charged with the responsibility to consider each application for the program individually, and thus to determine in each instance whether the granting of benefits under the program is in the public interest.


A copy of this opinion is being forwarded to the Attorney General for his review and action.

Yours very truly,

MANGUM, WALL, STOOPS & WARDEN


A. Dean Pickett

ADP:vea

pc:  Mr. Bob Corbin,
Attorney General
Mr. John L. Verkamp,
Coconino County Attorney



Navajo County Attorney

March 29, 1984

R84- 065

NAVAJO COUNTY ATTORNEY OPINION #CAS-005

E K. PATTON JR.
JNTY ATTORNEY

Mr. Jim Freeman
Superintendent
Winslow Unified School Dist. #1
P. O. Box 580
Winslow, Arizona 86047

EDUCATION OPINION

ISSUE NO LATER THAN

12/1/84

Re: Your letter of 2-15-84

Dear Mr. Freeman:

You have presented the following questions for review by the Navajo County Attorney's office.

- (1) Is the early retirement part-time employment program for certified employees (a copy of which is attached to this opinion) within the power of the district and enforceable?
- (2) Is the early retirement program for non-certified employees within the power of the board and enforceable?
- (3) Is the statement regarding retirement adopted by the board (a copy of which is attached) enforceable?
- (4) Is the statement regarding retirement - unused sick leave compensation adopted by the board (a copy of which is attached) within the authority of the board and enforceable?

In reference to all of the questions asked, this office has reviewed numerous Attorney General opinions, many of which seem to be contradictory, Arizona Statutes, Case Law and the Arizona Constitution. Specifically we have reviewed Attorney General Opinion 83-051, 83-096, 84-005, and 84-026. We have also reviewed A.R.S. §15-536 et seq. regarding employment contracts, Article IX, Section 7 of the Arizona Constitution regarding gifts

WARNER G. LEPPIN
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D.L. THOMPSON
INVESTIGATOR

con't. .

NAVAJO COUNTY ATTORNEY OPINION #CAS-005

Mr. Jim Freeman
Winslow Unified School Dist. #1

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of public funds and School District #69 and Maricopa County v. Altherr, 10 Ariz. App. 333, 458 P2d. 537, (1969).

Question #1 - It appears in reviewing the above matters, that the school district does in fact have the authority to contract with an employee to provide medical care following retirement and to compensate an employee for early retirement. The early retirement part-time employment program (hereinafter referred to as ERPEP) may be incorporated into contracts offered to probationary or certificated teachers by reference and is within the authority of the board. However, as indicated in Attorney General Opinion 84-026, any early retirement under the ERPEP program or any other program must be voluntary on the part of the teacher.

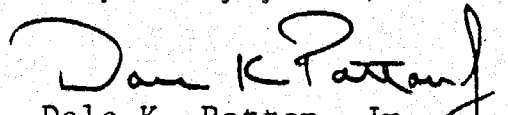
Question #2 - As indicated in the preceding paragraphs, it is the opinion of the County Attorney that if the early retirement program (hereinafter referred to as ERP) is incorporated into the contracts for the non-certified employees and made voluntary with those employees that the board has the authority to offer the program as outlined.

Question #3 - Regarding the retirement policy, it is unclear whether the group-hospitalization life-insurance premiums will be paid by the employee or by the district. In either case, it is again the opinion of this office that the governing board may include by reference the retirement policy as set forth in said document in the contracts for certified and classified employees as discussed above and that the same would be within the authority of the board.

Question #4 - The board has the authority to compensate for unused sick leave as set out in the retirement-unused sick leave compensation policy attached hereto. That policy is impliedly a part of all contracts let by the district and therefore need not be referred to specifically in the contracts to make it binding or enforceable.

This opinion is forwarded to the Attorney General for review pursuant to A.R.S. §15-253.

Very truly yours,


Dale K. Patton, Jr.
Navajo County Attorney

DKP:m

cc: Attorney General